

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

MARGARET WITTERS,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

Case No. 3:14-cv-05744-KLS

ORDER REVERSING AND  
REMANDING DEFENDANT'S  
DECISION TO DENY BENEFITS

Plaintiff has brought this matter for judicial review of defendant's denial of her applications for disability insurance and supplemental security income ("SSI") benefits. Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. After reviewing the parties' briefs and the remaining record, the Court hereby finds that for the reasons set forth below, defendant's decision to deny benefits should be reversed and this matter should be remanded for further administrative proceedings.

FACTUAL AND PROCEDURAL HISTORY

On March 22, 2011, plaintiff filed an application for disability insurance benefits and another one for SSI benefits, alleging in both applications she became disabled beginning January 5, 2009. *See* Dkt. 15, Administrative Record ("AR") 31. Both applications were denied upon initial administrative review on June 6, 2011, and on reconsideration on October 4, 2011.

1 *See id.* A hearing was held before an administrative law judge (“ALJ”) on November 1, 2012, at  
2 which plaintiff, represented by counsel, appeared and testified, as did a vocational expert. *See*  
3 AR 83-113.

4 In a decision dated December 12, 2012, the ALJ determined plaintiff to be not disabled.  
5 *See* AR 31-49. Plaintiff’s request for review of the ALJ’s decision was denied by the Appeals  
6 Council on July 29, 2014, making that decision the final decision of the Commissioner of Social  
7 Security (the “Commissioner”). *See* AR 1; 20 C.F.R. § 404.981, § 416.1481. On September 23,  
8 2014, plaintiff filed a complaint in this Court seeking judicial review of the Commissioner’s final  
9 decision. *See* Dkt. 3. The administrative record was filed with the Court on November 26, 2014.  
10 *See* Dkt. 15. The parties have completed their briefing, and thus this matter is now ripe for the  
11 Court’s review.  
12

13 Plaintiff argues defendant’s decision to deny benefits should be reversed and remanded  
14 for an award of benefits, or in the alternative for further administrative proceedings, because the  
15 ALJ erred: (1) in evaluating the opinion evidence from Tasmyn Bowes, Psy.D., Kimberly  
16 Wheeler, Ph.D., Michael Brown, Ph.D., and Therese Stokan, D.O.; (2) in discounting plaintiff’s  
17 credibility; (3) in assessing plaintiff’s residual functional capacity; and (5) in finding plaintiff to  
18 be capable of performing other jobs existing in significant numbers in the national economy. For  
19 the reasons set forth below, the Court agrees the ALJ erred in evaluating the opinion evidence  
20 from Dr. Stokan – and thus in assessing plaintiff’s residual functional capacity and in finding her  
21 to be capable of performing other jobs existing in significant numbers in the national economy –  
22 and therefore in determining plaintiff to be not disabled. Also for the reasons set forth below,  
23 however, the Court finds that while defendant’s decision to deny benefits should be reversed on  
24 this basis, this matter should be remanded for further administrative proceedings.  
25  
26

## DISCUSSION

The determination of the Commissioner that a claimant is not disabled must be upheld by the Court, if the “proper legal standards” have been applied by the Commissioner, and the “substantial evidence in the record as a whole supports” that determination. *Hoffman v. Heckler*, 785 F.2d 1423, 1425 (9th Cir. 1986); *see also Batson v. Commissioner of Social Security Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004); *Carr v. Sullivan*, 772 F.Supp. 522, 525 (E.D. Wash. 1991) (“A decision supported by substantial evidence will, nevertheless, be set aside if the proper legal standards were not applied in weighing the evidence and making the decision.”) (citing *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1987)).

Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citation omitted); *see also Batson*, 359 F.3d at 1193 (“[T]he Commissioner’s findings are upheld if supported by inferences reasonably drawn from the record.”). “The substantial evidence test requires that the reviewing court determine” whether the Commissioner’s decision is “supported by more than a scintilla of evidence, although less than a preponderance of the evidence is required.” *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). “If the evidence admits of more than one rational interpretation,” the Commissioner’s decision must be upheld. *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984) (“Where there is conflicting evidence sufficient to support either outcome, we must affirm the decision actually made.”) (quoting *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971)).<sup>1</sup>

---

<sup>1</sup> As the Ninth Circuit has further explained:

... It is immaterial that the evidence in a case would permit a different conclusion than that which the [Commissioner] reached. If the [Commissioner]’s findings are supported by substantial evidence, the courts are required to accept them. It is the function of the [Commissioner], and not the court’s to resolve conflicts in the evidence. While the court may not try the case de novo, neither may it abdicate its traditional function of review. It must

I. The ALJ's Evaluation of Dr. Stokan's Opinion

The ALJ is responsible for determining credibility and resolving ambiguities and conflicts in the medical evidence. *See Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Where the medical evidence in the record is not conclusive, "questions of credibility and resolution of conflicts" are solely the functions of the ALJ. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982). In such cases, "the ALJ's conclusion must be upheld." *Morgan v. Commissioner of the Social Security Admin.*, 169 F.3d 595, 601 (9th Cir. 1999). Determining whether inconsistencies in the medical evidence "are material (or are in fact inconsistencies at all) and whether certain factors are relevant to discount" the opinions of medical experts "falls within this responsibility." *Id.* at 603.

In resolving questions of credibility and conflicts in the evidence, an ALJ's findings "must be supported by specific, cogent reasons." *Reddick*, 157 F.3d at 725. The ALJ can do this "by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Id.* The ALJ also may draw inferences "logically flowing from the evidence." *Sample*, 694 F.2d at 642. Further, the Court itself may draw "specific and legitimate inferences from the ALJ's opinion." *Magallanes v. Bowen*, 881 F.2d 747, 755, (9th Cir. 1989).

The ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted opinion of either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Even when a treating or examining physician's opinion is contradicted, that opinion "can only be rejected for specific and legitimate reasons that are supported by substantial evidence in

---

scrutinize the record as a whole to determine whether the [Commissioner]'s conclusions are rational. If they are . . . they must be upheld.

*Sorenson*, 514 F.2d at 1119 n.10.

1 the record.” *Id.* at 830-31. However, the ALJ “need not discuss *all* evidence presented” to him or  
2 her. *Vincent on Behalf of Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984) (citation  
3 omitted) (emphasis in original). The ALJ must only explain why “significant probative evidence  
4 has been rejected.” *Id.*; *see also Cotter v. Harris*, 642 F.2d 700, 706-07 (3rd Cir. 1981); *Garfield*  
5 *v. Schweiker*, 732 F.2d 605, 610 (7th Cir. 1984).

6  
7 In general, more weight is given to a treating physician’s opinion than to the opinions of  
8 those who do not treat the claimant. *See Lester*, 81 F.3d at 830. On the other hand, an ALJ need  
9 not accept the opinion of a treating physician, “if that opinion is brief, conclusory, and  
10 inadequately supported by clinical findings” or “by the record as a whole.” *Batson v.*  
11 *Commissioner of Social Security Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004); *see also Thomas*  
12 *v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th  
13 Cir. 2001). An examining physician’s opinion is “entitled to greater weight than the opinion of a  
14 nonexamining physician.” *Lester*, 81 F.3d at 830-31. A non-examining physician’s opinion may  
15 constitute substantial evidence if “it is consistent with other independent evidence in the record.”  
16 *Id.* at 830-31; *Tonapetyan*, 242 F.3d at 1149.

17  
18 Plaintiff argues the ALJ erred in rejecting the October 22, 2015 opinion of Dr. Stokan  
19 concerning her physical functional limitations. The Court agrees. With respect to that opinion,  
20 the ALJ found in relevant part:

21  
22 Dr. Stokan . . . opined that the claimant could not stand for more than ten to  
23 fifteen minutes at a time, could not sit for more than ten to fifteen minutes at a  
24 time and would need to lie down at least twice during an eight-hour workday  
25 for at least an hour to relieve pain. She opined that the claimant’s use of arm  
26 crutches was medically necessary and the claimant would have missed three  
days per month or more because of her back impairment (Exhibit 29F). Little  
weight is given to this opinion. It is not consistent with Dr. Stokan’s other  
opinions and there is no apparent reason for the significant change. It is not  
the first inconsistent opinion from this physician. It is also not consistent with  
the objective medical evidence in the record or the opinion of [Lisa Garrison,

1 M.D.,] who conducted [a] consultative examination [in late July 2012]. The  
2 claimant's most recent x-rays and CT scan showed only mild changes which  
3 is not consistent with this opinion. This opinion appears to be based primarily  
4 on the claimant's reports of pain and her pain behavior which cannot be relied  
5 upon because of the claimant's undermined credibility.

6 AR 45. First, the sitting and standing restrictions Dr. Stokan assessed in late October 2012, are  
7 not substantially dissimilar to those she assessed in her first opinion in late February 2011. *See*  
8 AR 539-40, 995-96. Second, while the lifting and carrying restrictions Dr. Stokan assessed in her  
9 second opinion in late February 2012, are less restrictive than those she assessed in late February  
10 2011 (*see* AR 539, 752), given that no lifting or carrying restrictions were assessed by her in late  
11 October 2012 (*see* AR 995-96) – and no specific sitting or standing restrictions were assessed in  
12 the late February 2012 opinion (*see* AR 752)<sup>2</sup> – these latter two opinions also are not necessarily  
13 inconsistent with each other. *See* AR 752-53, 995-96.

14 Second, the ALJ's general assertion that the restrictions contained in Dr. Stokan's late  
15 October 2012 opinion are not consistent with the objective evidence in the record is insufficient  
16 to uphold the ALJ's rejection of that opinion. *See Garrison v. Colvin*, 759 F.3d 995, 1012-13  
17 (9th Cir. 2014) (error to reject medical source's opinion by "asserting without explanation that  
18 another medical opinion is more persuasive, or criticizing it with boilerplate language that fails  
19 to offer a substantive basis for" that rejection). Dr. Stokan's own treatment notes, furthermore,  
20 contain a number of objective clinical findings – particularly notations of exquisite tenderness  
21 and significantly decreased bending and lower extremity strength – that could be supportive of  
22 the level of restriction she assessed, even with only mild changes seen on the most recent x-rays  
23

---

24 <sup>2</sup> Plaintiff argues the fact that two boxes indicating she can stand for six hours in an eight-hour workday with  
25 standard rest breaks and sit for prolonged periods with occasional pushing and pulling of arm or leg controls were  
26 left blank on the evaluation form Dr. Stokan completed at the time, "gives the impression that" Dr. Stokan believed  
she "could not perform regular work efforts. Dkt. 19, p. 13; *see also* AR 752. While this may indicate Dr. Stokan did  
not believe plaintiff could perform these designated tasks for the specific time periods noted, plaintiff fails to show  
how, and the Court does not find, that it necessarily suggests an inability to perform regular sustained work efforts,  
or that Dr. Stokan believed this to be the case.

and/or CT scans.<sup>3</sup> See AR 587, 589, 592-94, 619, 627, 630, 699, 706, 713, 716, 721, 755, 830, 834, 837, 841, 848, 854, 861, 867, 871, 878, 883, 887, 890, 902, 906, 910-11.

Third, although Dr. Garrison's opinion clearly is at odds with the late October 2012 opinion of Dr. Stokan (see AR 805-100), Dr. Garrison is an examining physician, and the ALJ fails to explain why as plaintiff's treating physician, Dr. Stokan's opinion is not entitled to greater weight. See 20 C.F.R. § 404.1527(d)(2), 20 C.F.R. § 416.927(d)(2) ("Generally, we give more weight to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations.").

Fourth, in her late October 2012 opinion Dr. Stokan points to several significant clinical findings in addition to plaintiff's self-reporting as a basis for her conclusions, and thus it is not at all clear she relied primarily on the latter in forming her opinion. See AR 995-996; *Morgan*, 169 F.3d at 602 ("A physician's opinion of disability 'premised to a large extent upon the claimant's own accounts of his symptoms and limitations' may be disregarded where those complaints have been 'properly discounted.'") (quoting *Fair v. Bowen*, 885 F.2d 597, 605 (9th Cir.1989)). For all the above reasons, therefore, the ALJ erred.

## II. The ALJ's Assessment of Plaintiff's Residual Functional Capacity

Defendant employs a five-step "sequential evaluation process" to determine whether a claimant is disabled. See 20 C.F.R. § 404.1520; 20 C.F.R. § 416.920. If the claimant is found

---

<sup>3</sup> To the extent the ALJ was relying on the x-ray and CT scan findings to discount the objective clinical findings in Dr. Stokan's own treatment notes as a basis for the late October 2012 opinion, this was an improper substitution of the ALJ's own lay opinion for that of Dr. Stokan. See *Gonzalez Perez v. Secretary of Health and Human Services*, 812 F.2d 747, 749 (1st Cir. 1987); *McBrayer v. Secretary of Health and Human Services*, 712 F.2d 795, 799 (2nd Cir. 1983); *Gober v. Mathews*, 574 F.2d 772, 777 (3rd Cir. 1978).

1 disabled or not disabled at any particular step thereof, the disability determination is made at that  
2 step, and the sequential evaluation process ends. *See id.* If a disability determination “cannot be  
3 made on the basis of medical factors alone at step three of that process,” the ALJ must identify  
4 the claimant’s “functional limitations and restrictions” and assess his or her “remaining  
5 capacities for work-related activities.” Social Security Ruling (“SSR”) [SSR] 96-8p, 1996 WL  
6 374184 \*2. A claimant’s residual functional capacity (“RFC”) assessment is used at step four to  
7 determine whether he or she can do his or her past relevant work, and at step five to determine  
8 whether he or she can do other work. *See id.*

10 Residual functional capacity thus is what the claimant “can still do despite his or her  
11 limitations.” *Id.* It is the maximum amount of work the claimant is able to perform based on all  
12 of the relevant evidence in the record. *See id.* However, an inability to work must result from the  
13 claimant’s “physical or mental impairment(s).” *Id.* Thus, the ALJ must consider only those  
14 limitations and restrictions “attributable to medically determinable impairments.” *Id.* In assessing  
15 a claimant’s RFC, the ALJ also is required to discuss why the claimant’s “symptom-related  
16 functional limitations and restrictions can or cannot reasonably be accepted as consistent with the  
17 medical or other evidence.” *Id.* at \*7.

19 The ALJ in this case found plaintiff had the residual functional capacity:

20 . . . to perform light work . . . that does not require more than frequent use  
21 of right leg controls; that does not require more than occasional  
22 balancing, stooping, kneeling, crouching, crawling, or climbing of ramps  
23 or stairs; that does not require any climbing of ladders, ropes, or  
24 scaffolds; that does not require concentrated exposure to extreme cold,  
25 vibrations, or hazards such as unprotected heights or open machinery;  
26 and that does not require more than superficial public or co-worker  
contact.

AR 36 (emphasis in original). But because the ALJ erred in evaluating the late October 2012  
opinion from Dr. Stokan, the ALJ’s RFC assessment cannot be said to completely and accurately



1 describe all of plaintiff's functional limitations or to be supported by substantial evidence, and  
2 therefore cannot be upheld.

3 III. The ALJ's Findings at Step Five

4 If a claimant cannot perform his or her past relevant work, at step five of the disability  
5 evaluation process the ALJ must show there are a significant number of jobs in the national  
6 economy the claimant is able to do. *See Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999);  
7 20 C.F.R. § 404.1520(d), (e), § 416.920(d), (e). The ALJ can do this through the testimony of a  
8 vocational expert or by reference to defendant's Medical-Vocational Guidelines (the "Grids").  
9 *Osenbrock v. Apfel*, 240 F.3d 1157, 1162 (9th Cir. 2000); *Tackett*, 180 F.3d at 1100-1101.

11 An ALJ's findings will be upheld if the weight of the medical evidence supports the  
12 hypothetical posed by the ALJ. *See Martinez v. Heckler*, 807 F.2d 771, 774 (9th Cir. 1987);  
13 *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984). The vocational expert's testimony  
14 therefore must be reliable in light of the medical evidence to qualify as substantial evidence. *See*  
15 *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988). Accordingly, the ALJ's description of the  
16 claimant's disability "must be accurate, detailed, and supported by the medical record." *Id.*  
17 (citations omitted). The ALJ, however, may omit from that description those limitations he or  
18 she finds do not exist. *See Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).

20 At the hearing, the ALJ posed a hypothetical question to the vocational expert containing  
21 substantially the same limitations as were included in the ALJ's assessment of plaintiff's residual  
22 functional capacity. *See* AR 108-09. In response to that question, the vocational expert testified  
23 that an individual with those limitations – and with the same age, education and work experience  
24 as plaintiff – would be able to perform other jobs. *See* AR 108-110. Based on the testimony of  
25 the vocational expert, the ALJ found plaintiff would be capable of performing other jobs existing  
26

1 in significant numbers in the national economy. *See* AR 47-48. Because the ALJ's assessment of  
2 plaintiff's RFC was erroneous, however, the hypothetical question he posed cannot be said to  
3 completely and accurately describe all of plaintiff's functional limitations, and thus the ALJ's  
4 reliance on the vocational expert's testimony to find plaintiff not disabled at step five also cannot  
5 be said to be supported by substantial evidence or free of error.

6  
7 IV. This Matter Should Be Remanded for Further Administrative Proceedings

8 The Court may remand this case "either for additional evidence and findings or to award  
9 benefits." *Smolen*, 80 F.3d at 1292. Generally, when the Court reverses an ALJ's decision, "the  
10 proper course, except in rare circumstances, is to remand to the agency for additional  
11 investigation or explanation." *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations  
12 omitted). Thus, it is "the unusual case in which it is clear from the record that the claimant is  
13 unable to perform gainful employment in the national economy," that "remand for an immediate  
14 award of benefits is appropriate." *Id.*

15  
16 Benefits may be awarded where "the record has been fully developed" and "further  
17 administrative proceedings would serve no useful purpose." *Smolen*, 80 F.3d at 1292; *Holohan v.*  
18 *Massanari*, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded  
19 where:

20 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the  
21 claimant's] evidence, (2) there are no outstanding issues that must be resolved  
22 before a determination of disability can be made, and (3) it is clear from the  
23 record that the ALJ would be required to find the claimant disabled were such  
evidence credited.

24 *Smolen*, 80 F.3d 1273 at 1292; *McCartey v. Massanari*, 298 F.3d 1072, 1076-77 (9th Cir. 2002).

25 Plaintiff argues remand for an outright award of benefits is appropriate in this case in light of all  
26 the ALJ's errors. While as discussed above, the ALJ failed to give sufficient reasons for rejecting

1 the opinion evidence from Dr. Stokan, that evidence is not entirely consistent with the objective  
2 medical evidence in the record overall, particularly Dr. Garrison's evaluation report and findings  
3 discussed above. Accordingly, the Court finds remand for further administrative proceedings is  
4 more appropriate, given the outstanding issues that inconsistency presents in regard to plaintiff's  
5 residual functional capacity and ability to perform other jobs.

6  
7 CONCLUSION

8 Based on the foregoing discussion, the Court hereby finds the ALJ improperly concluded  
9 plaintiff was not disabled. Accordingly, defendant's decision to deny benefits is REVERSED  
10 and this matter is REMANDED for further administrative proceedings in accordance with the  
11 findings contained herein.

12 DATED this 6th day of May, 2015.

13  
14  
15  
16 

17 Karen L. Strombom  
18 United States Magistrate Judge  
19  
20  
21  
22  
23  
24  
25  
26